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Supreme Court of the United States

October Term, 1973

NO. 73-1405

JEFFERSON T. BAKER, *Petitioner*

against

HON. ROBERT F. FROEHLKE,
Secretary of the Army of the United States,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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against

HON. ROBERT F. FROEHLKE,
Secretary of the Army of the United States,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to re-
ew the judgment herein of the United States Court of
ppeals for the Fifth Circuit entered in the above entitled
se on October 24, 1973, petition for rehearing *en banc*
nely filed on November 7, 1973, and petition for re-
aring denied by the United States Court of Appeals for
e Fifth Circuit on December 21, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is contained in the Appendix hereto. It affirmed a judgment of dismissal for failure to exhaust adminstrative remedies, which order of dismissal was entered by the U. S. District Court for the Northern District of Texas. There is an order, but no opinion of the District Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 24, 1973. Thereafter on November 7, 1973 Petitioner timely filed a motion for rehearing *en banc*. This motion for rehearing was overruled and denied by the Court of Appeals for the Fifth Circuit by order of December 21, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the Court below err in holding that the petitioner had not exhausted all of his adminstrative remedies prior to seeking access to a United States District Court for a review of his cause?

2. Was the Petitioner denied due process of law, as guaranteed by the Fifth Amendment, in that the Army regulation under which he was tried and discharged, to wit AR-140-5, Section 74c, 1931, gave no fair warning of the conduct which it proscribed and failed to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities?

3. Was the Petitioner denied due process of law as uaranteed by the Fifth Amendment, in that a legal act, wit, changing his name and running for office was beled "misconduct" and made the sole basis for terminat- g his reserve commission and discharging him under conditions other than honorable," even though such gal act was not connected with his performance of ilitary duties?

CONSTITUTIONAL PROVISION INVOLVED

Amendment V

"No person shall * * * be deprived of life, liberty, or roperty, without due process of law * * *."

STATUTE AND REGULATION INVOLVED

The Statutes involved are Title 10 U.S.C. §§ 1552 and 1553, and Army Regulation 140-5, Section 74c, dated April 16, 1931. 28 U.S.C. 1254 is also cited here only for jurisdiction of the U. S. Supreme Court.

STATEMENT OF THE CASE

About 40 years ago, in 1934, the Petitioner had his reserve commission as a first lieutenant of infantry terminated upon recommendation of an Army Board of Inquiry, held pursuant to Army Regulation 140-5, Section 74c, dated April 16, 1931, a regulation which allowed and directed the corps area commander, in time of peace, to convene a Board of Inquiry upon receiving reports of "misconduct, inefficiency, or other unfitness on the part of any reserve officer."

In April, 1941, the Adjutant-General formally determined that Petitioner's discharge from the Army Reserve was "under conditions other than honorable."

The only "misconduct" alleged against the Petitioner was the act of legally changing his name in a Texas state court from Jefferson T. Baker to George Baker Terrell—a name similar to that of another Texas politician, George Butler Terrell—in order to run for political office, to wit, Treasurer of the State of Texas. George Butler Terrell, the politician of similar name, was not a candidate in that particular election for Treasurer, nor at that time for any other office.

A change of name for such a purpose is legal in Texas, and so far as is known, is not in contravention of any Federal law. The Petitioner's efficiency, fitness and ability as a soldier were not questioned.

Following his name change in the Texas state court, the Petitioner had his name changed on the Army records from Jefferson T. Baker to George Baker Terrell, and a new reserve commission was issued in the name of Terrell.

The other politician of similar name, George Butler Terrell, now presumably disgruntled, in an action which was later held void by the courts of Texas, obtained from the same district court which had granted the name change, an ex parte order without notice, actual or constructive to, and without service upon, the Petitioner, which said ex parte order revoked the name change. The order of revocation was illegally granted in that it was done without notice to Petitioner and was also granted and entered when the term of court had passed and the name change had become final.

After this occurred, the Petitioner requested the Army change his name on its records from George Baker Terrell to Jefferson T. Baker, his original name, and to issue a corrected commission, and it was shortly after his request that the Board of Inquiry in question was convened.

The Board of Inquiry met, and though it was timely pointed out to them that no case had been made, nevertheless found that the petitioner "did perpetrate a fraud and deception upon the people of the State of Texas and upon the 68th Judicial District Court of Dallas County, Texas", and further recommended that the reserve commission of the Petitioner be terminated, which was later done by the Adjutant-General upon the said Board's recommendation.

In 1944 the Petitioner applied to the Secretary of War's Discharge Review Board for correction of his discharge to an honorable discharge that would not prevent his entering the U. S. Army. The application was reviewed and denied. Again in 1960 he requested reconsideration of his case by the Discharge Review Board. This request was also denied.

In 1964 the Petitioner wrote to the President of the United States a letter requesting "restitution." This letter was referred to the Department of Defense for a reply, and the Petitioner was advised that he might apply to the Army Discharge Review Board for a rehearing of his case, and that such a rehearing might be had whether or not any new evidence was offered. Petitioner, having already had his cause adjudicated adversely to him in that forum, and having already been refused one rehearing by that same forum, and having no new evidence, did not make a third application.

It is also undisputed that Petitioner has never applied to, nor been reviewed by, nor appeared before, the Army Board for Correction of Military Records as presumably required by Title 10, § 1552 U.S.C.

In August, 1972, the Petitioner filed suit, later amending his petition, in the U. S. District Court for the Northern District of Texas, in which he set forth substantially the foregoing in detail, and in which he complained of the deprivation of his constitutional rights, to-wit, denial of due process of law under the 5th Amendment because of the vagueness and lack of any ascertainable standard of guilt of the Army regulation involved, and because he was discharged for doing a lawful act that as a citizen he had a right to do. Petitioner prayed at that time that the action of the Board of Inquiry be set aside and the appropriate records corrected, or in the alternative that he be granted an honorable discharge from the U. S. Army, and he also prayed general relief.

The Defendant, the Hon. Robert F. Froehlke, Secretary of the Army of the United States, after some preliminary pleading, filed a motion to dismiss and/or for Summary Judgment, in which he said that Petitioner's Original Petition failed to establish a basis for jurisdiction over the subject matter of said petition, failed to state a claim upon which relief could be granted, and that the Defendant was entitled to judgment as a matter of law, there being no material issue of fact in that the Petitioner had not exhausted all administrative remedies available to him. The Petitioner also filed a Motion for Summary Judgment, and both sides filed briefs with the Court. The Honorable District Court took jurisdiction of the case, but dismissed Petitioner's lawsuit by order of April 16, 1973,

"for the reason that the Plaintiff has failed to exhaust his administrative remedies, and therefore the above entitled and numbered cause be, and the same is, hereby dismissed."

Appeal was perfected to the Court of Appeals for the Fifth Circuit, which affirmed by opinion dated October 24, 1973. Petitioner then timely moved for a rehearing en banc on November 7, 1973, which said motion for rehearing was overruled and denied by order of the Court of Appeals on December 21, 1973, and it is these judgments of the Court of Appeals for the Fifth Circuit that Petitioner seeks to have reviewed by writ of certiorari.

REASONS FOR GRANTING THE WRIT

I

In holding that Petitioner had failed to exhaust the administrative remedies available to him under 10 U.S.C. § 1552-1553 (1970), the United States Court of Appeals for the Fifth Circuit rendered a decision in conflict with the decisions of the Supreme Court of the United States as well as the decisions of other courts of appeals on the question of the necessity of application to the Board for Correction of Military Records as a prerequisite for access to the U. S. District Court.

It has been undisputed throughout this case that the Petitioner had his cause reviewed by the Army Discharge Review Board within the 15-year period specified in Title 10 U.S.C. § 1553. However Title 10 U.S.C. § 1552 directs an application to the Army Board for Correction of Military Records, which Petitioner did not do. The

circuits were in conflict over whether a review by the Army Board for Correction of Military Records was mandatory to confer jurisdiction upon the U. S. District Courts. In a series of conscientious objector cases, which are no different in principle from Petitioner's, the Courts of Appeals grappled with this problem. The issue was settled by the Supreme Court of the United States in *Craycroft v. Ferrall,* 408 F.2d 587 (CA 9, 1969), 397 U.S. 335, 25 L.Ed.2d 351, 90 S.Ct. 1152 (1970), and *Parisi v. Davidson,* 405 U.S. 34, 31 L.Ed.2d 17, 92 S.Ct. 815 (1972).

In a footnote to the opinion in the *Parisi* case, 31 L.Ed.2d 17 (1972) at page 25, the Court said:

> "Under the rule of *Craycroft v. Ferrall,* 408 F.2d 587 (CA 9, 1969), the petitioner was required to appeal the Department of the Army's decision to the civilian Army Board for the Correction of Military Records in order to exhaust military administrative remedies and have access to Federal Court. Current governmental policy rejects *Craycroft.* Compliance with Army Regulation 635-20, not perfection of an ABCMR appeal, marks the point when military administrative procedures have been exhausted. Department of Justice Memo No. 652 (Oct. 23, 1969). In *Craycroft v. Ferrall,* 397 U.S. 335, 25 L.Ed.2d 351, 90 S.Ct. 1152, this Court vacated the judgment of the Ninth Circuit that the petitioner there had to appeal to the Board for the Correction of Naval Records before proceeding in federal court. But our decision was announced on March 30, 1970, more than four months after the present petitioner had appealed to the ABCMR."

The lower courts, in the instant case, by Delphic and ambiguous rulings have attempted to ignore the clear

policy of the United States Supreme Court on the foregoing issue. The Petitioner here had two and only two statutory requirements to meet to exhaust his military administrative remedies: 1) a review by the Army Discharge Review Board within 15 years of the discharge, which was timely done, and 2) a review by the Army Board for Correction of Military Records, which the Supreme Court held not necessary in the *Craycroft* and *Parisi* cases.

The District Court, in its laconic order, held that the dismissal was for failure to exhaust administrative remedies. Since the Army Discharge Review Board had been applied to and a review held, which is all the statute requires, the order could only mean that the Petitioner had failed to apply to the Army Board for Correction of Military Records, which in fact Petitioner actually did not do.

On appeal, the law was exhaustively reviewed by petitioner, and the question of the necessity of application to the Army Board for Correction of Military Records in order to gain access to the U. S. District Court was squarely presented to the Court of Appeals, citing the *Craycroft* and *Parisi* cases.

Instead of discussing the point presented in Petitioner's brief, the Honorable Court of Appeals for the 5th Circuit thought it right to put petitioner's case on the summary calendar, and in a meager opinion, held, without explaining why, that "the trial court correctly held that the plaintiff was not entitled to relief because he had failed to exhaust the administrative remedies available to him under 10 U.S.C. §§ 1552-53 (1970)." The honorable Court of Appeals then proceeded to support its

opinion by reference to a group of cases which are either not in point or are easily distinguishable from the case at bar.

As a matter of fact, the trial court did *not* hold that petitioner was not entitled to relief. The trial court simply denied petitioner the use of U. S. District Court as a forum for trial of the merits on the ground of non-exhaustion of administrative remedies. Since there were only two possibilities open to the Petitioner to perform, and since he had performed one of them, the opinion of the Court of Appeals can only mean that application to the Army Board for the Correction of Military Records is a prerequisite for jurisdiction in the U. S. District Courts in military cases. This is precisely the point that the United States Supreme Court has declared *not* to be the law in the *Craycroft* and *Parisi* cases. The honorable Court of Appeals for the Fifth Circuit is thus, in this indirect, equivocal, and enigmatic manner actually circumventing the expressed will and determination of the Supreme Court of the United States.

This decision of the Court of Appeals, if permitted to stand, not only contributes to the confusion in which the point in question has until recently been entangled, but it means, as a practical matter, that *Craycroft* and *Parisi* are the law of the land everywhere but in the Fifth Circuit. It is clear that the Court of Appeals for the Fifth Circuit is applying some unknown, but very different, standard of law in cases where discharges are sought to be reviewed in the Federal District Courts, and where exhaustion of administrative remedies is in question, to that certain and equitable rule of law recently expressed by the U. S. Supreme Court in *Craycroft* and *Parisi*.

The honorable Supreme Court of the United States should grant certiorari in this matter to elucidate and resolve the differences between its own rulings and the rulings that continue to come on this point of law from the Court of Appeals for the Fifth Circuit, which differ not only from the U. S. Supreme Court's ruling, but also from the Court of Appeals for the 9th Circuit, and other circuits.

II

Certiorari should be granted to review the constitutionality of the Army regulation under which Petitioner was tried by the Board of Inquiry, to wit, AR-140-5, Sec. 74c, 1931, since this regulation sets no standards for "misconduct" for which a Reserve Officer may be deprived of his commission and discharged; since it gives no fair warning of the conduct which it proscribes, and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities.

Avrech v. Secretary of the Navy, 477 F.2d 1237 (1973) petition for certiorari pending, 41 U.S.L.W. 3674, recently ruled on the constitutionality of Article 134 of the Uniform Code of Military Justice, known as the "General Article," imposing criminal sanctions on all disorders and neglects to prejudice of good order and discipline in the armed forces, and all conduct of a nature to bring discredit upon the armed forces. In this case, Mr. Justice Clark (U. S. Supreme Court, retired) sitting by designation, wrote the opinion declaring that Article 134 is too imprecise to satisfy the requirements of the Fifth Amendment in its employment of phrases like "all conduct of

a nature to bring discredit upon the armed forces" and "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

If the *Avrech* case (followed in *Hooper v. Laird,* 482 F.2d 784 (1973)) is the law, then certainly AR-140-5, Sec. 74c, 1931, is unconstitutional on its face, and *a fortiori* should be held too imprecise to satisfy the requirements of the Fifth Amendment. For AR-140-5, Sec. 74c merely prescribes that in time of peace reports of misconduct (without defining misconduct) will be forwarded to the Corps Area Commander who is empowered to convene a Board of Officers to investigate and make recommendations. The accused officer is to be informed of the alleged misconduct (still with no ascertainable standards or definitions), is to be given a hearing and the proceedings of the board of officers together with the action and recommendation of the convening authority will be forwarded to the Adjutant General for final action.

In this Regulation, no fair warning of proscribed conduct is given, misconduct is not defined, and the regulation fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities. The instant case is an excellent example of how such a regulation can be abused. It is not, and was not at all times material to this case, illegal to change one's name to run for public office. No crime, military or civilian, was committed. The Army regulations nowhere prohibited political activity by a reserve officer in peacetime. The petitioner had no warning that such conduct would be frowned on by the Army, nor did the enforcing authorities (the board of officers) have an ascertainable standard of guilt to circumscribe their discretion. They held that the

petitioner had been guilty of a "fraud", and exercised their discretion to brand otherwise legal conduct illegal, and this recommendation was used to ground and cause a discharge from the armed forces under "conditions other than honorable."

Administrative due process includes the right to a full and fair hearing. *Morgan v. United States*, 289 U.S. 468 (1936). The Petitioner contends that he was denied a fair hearing because of the ambiguity of the regulation and the abuse of discretion of the officers comprising the Board of Inquiry, and because he was discharged, in effect, for exercising his rights as a citizen.

The question of whether as a matter of law it is necessary, after review by the Army Discharge Review Board, also to apply to the Army Board for the Correction of Military Records, in seeking review and modification of a military discharge, as a precondition and requirement for access to the U. S. District Courts is an important one on which the U. S. Supreme Court has already ruled, but, one in which Petitioner has been denied the benefit of the law as stated by the U. S. Supreme Court.

The question of whether or not it is a denial of due process to try a person for an act otherwise lawful under an Army regulation which gives no fair warning of the conduct which it proscribes, and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities is also an important one which needs to be resolved.

Both the foregoing questions are presented in the case at bar, and this Court should grant certiorari to resolve them.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WALTER B. CONWAY
Counsel for Petitioner

2703 Nottingham Street
Houston, Texas 77005

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-2529
Summary Calendar*

JEFFERSON T. BAKER,
Plaintiff-Appellant,

versus

HON. ROBERT F. FROEHLKE,
Secretary of the Army of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

(October 24, 1973)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] The trial court correctly held that the plaintiff was not entitled to relief because he had failed to exhaust the administrative remedies available to him under 10 U.S.C. §§ 1552-53 (1970). See *Davis v. Secretary of the Army*, 5 Cir. 1971, 440 F.2d 817; *Stanford v. United States*, 5 Cir. 1969, 413 F.2d 1048; *Tuggle v. Brown*, 5 Cir. 1966, 362 F.2d 801; *McCurdy v. Zuckert*, 5 Cir. 1966, 359 F.2d 491.

* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-2529

JEFFERSON T. BAKER,
Plaintiff-Appellant,

versus

HON. ROBERT F. FROEHLKE,
Secretary of the Army of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Oct. 24, 1973, 5 Cir., 1973, ____ F.2d ____).

(December 21, 1973)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-2529

JEFFERSON T. BAKER,
Plaintiff-Appellant,

v.

HON. ROBERT F. FROEHLKE,
Secretary of the Army of the United States,
Defendant-Appellee.

PETITION FOR REHEARING EN BANC

The Honorable Judges of The United States Court of ppeals for the Fifth Circuit:

Jefferson T. Baker, the Plaintiff-Appellant above named, esents this, his petition for a rehearing en banc in the ove styled and numbered cause, and, in support thereof, pectfully shows:

I

This case squarely presents the question of the neces- of resort to the Army Board for Correction of Mili- y Records under Title 10 § 1552, U.S.C. as a juris- tional prerequisite for access to the District Courts of U. S. The United States Supreme Court has recently

held in two cases, to wit: *Craycroft v. Ferrall,* 397 U.S. 335, 25 L.Ed.2d 351, 90 S.Ct. 1152 (1970), and *Parisi v. Davidson,* 31 L.Ed2d 17 (1972), that resort to the Board for Correction of Military Records is not necessary in order to exhaust military administrative remedies and have access to Federal Court.

II

The decision below was clearly erroneous and should be reviewed at this time. The Honorable U. S. Court of Appeals for the Fifth Circuit in its opinion of affirmance herein, has clearly failed to apply the rule in the foregoing cited Supreme Court cases, as set out in paragraph I above.

III

The Appellant, Jefferson T. Baker has fully complied with the statutory requirements for exhaustion of available military administrative remedies as interpreted in the two cited Supreme Court opinions.

IV

The cases cited by the Honorable United States Court of Appeals for the Fifth Circuit, in its opinion of affirmance of October 24, 1973, either do not rule upon the same question of law, or else are clearly distinguishable from the case at bar.

V

Oral argument before the Court will clarify the issue and demonstrate the rectitude in law of Appellant's position.

WHEREFORE, upon the foregoing grounds, it is re-ectfully urged that this petition for rehearing be nted with oral argument allowed, and that the judg-nt of the District Court be, upon further consideration, ersed.

Walter B. Conway, attorney for Petitioner and Plaintiff-Appellant.

CERTIFICATE OF COUNSEL

I, Walter B. Conway, attorney for Jefferson T. Baker, hereby certify that the foregoing petition for a rehear-g of this cause is presented in good faith and not for rpose of delay.

CERTIFICATE OF SERVICE

I certify that a true reproduction of a typewritten copy the foregoing Petition for rehearing En Banc was iled to Frank D. McCown, Esq., U.S. Attorney, and ger Allen, Esq. Assistant U.S. Attorney, attorneys for ppellee at their office in Room 16G28, 1100 Commerce eet, Dallas, Texas 75202 on the 6th day of November, 73 A.D.

Walter B. Conway, Attorney for Appellant

§ 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, 62 Stat. 928.)

STATUTES INVOLVED

Title 10 § 1552 Correction of Military Records—Claims incident thereto—(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

Title 10 § 1553. Review of discharge or dismissal.—(a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request

for review must be made within 15 years after the date of the discharge or dismissal.

(b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

(c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Administrator of Veteran's Affairs under chapter 59 of title 38 (38 §§ 3401-3405). (Sept. 2, 1958, P.L. 85-857, § 13(4)(2), 72 Stat. 1267; Sept. 7, 1962, P.L. 87-651, Title I, § 110(a), 76 Stat. 509).

Amendment Note—Prior to Act Sept. 7, 1962, cited above, the limitations section of this statute reads as follows:

> "(c) No review is authorized under this section unless application therefor is filed with the proper board within fifteen years after whichever last occurred (1) the date of the discharge or dismissal sought to be reviewed, or (2) June 22, 1944."

RESERVE OFFICERS

c. Vacation of appointment.
d. Discharge.
e. Expiration of term of appointment.
f. Dismissal or dropping from the rolls.

71. Death.—The death of a reserve officer on active duty will be reported as prescribed in AR 600-550, in the case of a Regular Army officer; when in inactive status, it will be reported by his immediate commanding officer to The Adjutant General through military channels, giving place, date, and circumstances. All persons in the military service are enjoined to report the death of any reserve officer in inactive status coming under their notice, should they have reason to believe that such report will not otherwise be made. Each report of death should, whenever practicable, include the name, address, and degree of relationship of the nearest relative.

72. Resignation.—Resignations of reserve officers in whatever duty status will be forwarded through military channels to The Adjutant General. They will be tendered in letter form, will be unconditional, and will contain a statement of the reasons for which submitted. A reserve officer appointed during the existence of a state of war, if he submits his resignation, will be entitled to have his resignation accepted within six months after the war is terminated.

73. Vacation of appointment.—Any reserve officer who accepts an appointment in the service of the United States as an oficer of the Regular Army, or who accepts an

appointment in a different grade or section in the Officers' Reserve Corps, thereby vacates his former reserve appointment.

74. Discharge.—Any reserve officer may be discharged at any time in the discretion of the President. Discharge will be the form of separation in all cases not otherwise covered, including the following:

a. Incompatible occupation or office.—An enlistment or the acceptance of a commission in the active or reserve list of the United States Navy, Marine Corps, Coast Guard, Public Health Service, or Coast and Geodetic Survey is incompatible with the holding of an appointment in the Officers' Reserve Corps, and any reserve officer who so engages himself will be discharged.

b. Physical disqualification.—Requests or recommendations for discharge by reason of physical disqualification will be forwarded through military channels to corps area commanders, who will forward them to The Adjutant General with suitable evidence and recommendation for determination as to discharge or transfer to another section of the Officers' Reserve Corps or waiver of physical disqualification.

c. Misconduct, inefficiency, or other unfitness.—In time of peace reports of misconduct, inefficiency, or other unbefitness on the part of any reserve officer will be forwarded to the corps area commander, who will cause such investigation to be made as is deemed necessary, or as may be directed by higher authority. When the corps area commander deems it necessary, or should the officer concerned so request, in writing he will convene a suitable board of not less than three officers to further investigate and make recommendations. The officer whose

fitness is being inquired into will always be informed of the alleged misconduct, inefficiency or other unfitness, and will be given opportunity for a hearing before the board of officers, either in person, by counsel, or by brief, as he may elect. At least one reserve officer on inactive status will be included in the membership of such board. Proceedings of the board of officers, together with the action and recommendation of the convening authority, will be forwarded to The Adjutant General for final action.

IN THE

United States District Court

NORTHERN DISTRICT OF TEXAS

(Filed Feb. 7, 1973)

NO. CA-3-6226-B

JEFFERSON T. BAKER, Plaintiff

v.

HON. ROBERT F. FROEHLKE,
Secretary of the Army of the U. S., Defendant

PLAINTIFF'S FIRST AMENDED PETITION

To The Honorable Judge of Said Court:

Comes now Jefferson T. Baker, and exhibits this his 1st amended Original Petition, complaining of the Hon. Robert F. Froehlke, presently Secretary of the Army of the United States of America, hereinafter referred to as Defendant, and seeking to overturn and correct a wrongful action of a United States Army Board of Officers constituted and convened by order of the Commanding General of the Eighth Corps Area of the United States Army, or in the alternative by order of the General Commanding the 90th Division of the United States Army, which said Board of Officers met and convened pursuant to said order on Monday, September 24th, 1934 A.D., at 530-32 Federal Building, Dallas, Texas, and further seeking to compel correction of military records which originated as a result of the actions of said Board of

Officers and their superior officers in the United States Army, and in support of this his said first amended petition, would respectfully show the Court:

I.

This honorable Court has jurisdiction of this cause, since important questions under the U. S. Constitution are here alleged, since the Defendant is the Secretary of the Army of the U. S., and since, as will be shown, all real administrative remedies have been exhausted. Venue is properly laid in this honorable Court, since the venue is properly laid in the judicial district where the cause of action arose, 28 U.S.C. § 1391 (e). This cause of action has its roots in this district where the proceeding by the aforesaid Board of Officers was held. The cause of action for venue purposes can be said to arise wherever substantial material events took place. *United States Ex Rel. Flemings v. Chafee,* 330 F. Supp. 193 (1971).

II

The facts are as follows:

Under date of June 28, 1934 A.D., the Plaintiff, Jefferson T. Baker, then a First Lieutenant in the Infantry Reserve of the United States Army, requested that his name be changed on the records of the War Department to George Baker Terrell, enclosing a copy of a court decree of the District Court of Dallas County, Texas for the 116th Judicial District, which said decree authorized him, the said Plaintiff, to change his name from Jefferson T. Baker to George Baker Terrell. This decree was

submitted by certified copy, and the aforesaid decree was dated May 31, 1934 A.D.

The request was forwarded to the War Department of the United States of America through proper channels, and the name of the Plaintiff was changed as requested, and a corrected commission was issued to the Plaintiff in the name of George Baker Terrell, reciting that the commission was effective from the first day of July, 1931 A.D., and said corrected commission being dated the nineteenth of July, 1934 A.D.

Thereafter, during the same year, the Plaintiff announced for the office of Treasurer of the State of Texas running under the name of George B. Terrell. At that time, and since, as far as Plaintiff can determine, there were no laws in the State of Texas forbidding a name change in order to run for public office.

At that time there was alive a certain congressman-at-large from Texas named George Butler Terrell. Congressman Terrell before the events hereinabove recited had announced his intention to retire from Congress.

After the Plaintiff filed for the office of Treasurer of the State of Texas, the then Congressman Terrell filed a suit in intervention in the District Court of Dallas County, Texas, asking the Court to set aside the name change, although, as Plaintiff believes, the name change was then *res judicata,* and the Congressman had no standing to pursue such a suit. This intervention was never served on the Plaintiff and he did not have actual or constructive notice of said lawsuit. On July 20, 1934 A.D., a decree was entered, again without notice to the Plaintiff herein,

revoking the name change and disbarring the Plaintiff from practice of law in the Courts of Texas. This was a futility, as the Plaintiff had not then, and has never had, a law license in the State of Texas, though he was then, and still is, a licensed attorney in good standing in the State of Arkansas. On July 24, 1937 A.D., another order was entered in the District Court of Dallas County, Texas, declaring the order of July 20, 1934 A.D., null, void, and without effect. This order of July 24, 1937 thereby nullified all findings of deceit, fraud, and/or deception, the attempted disbarment, and left the Plaintiff, character-wise, legally where he was before he changed his name.

In the meantime, on August 21, 1934 A.D., in conformity with the Court order of July 20, 1934 A.D., the Plaintiff requested the War Department that his name be recorded again as Jefferson Taswell Baker, enclosing a copy of the decree of July 20, 1934 A.D.

Upon the receipt of the latter request, the Commanding General of the Eighth Corps Area, ordered that a Board of Officers be convened to investigate and report as to the fitness of Mr. Baker, the Plaintiff herein, for retention as a Reserve Officer. The Board convened September 24, 1934 A.D. Mr. Baker, the Plaintiff herein, was represented by counsel, and testified in person before the Board, as did also Congressman George Butler Terrell. At the conclusion of the evidence the Board recommended that the reserve commission held by the Plaintiff be terminated. Accordingly, on the approved recommendation of the Board, Mr. Baker was discharged by direction of the President from the Officers Reserve Corps on November 3, 1934 A.D. It is the foregoing

action of the aforesaid Board of Officers and the action of the United States Army in discharging him, without due process of law, or equal protection of the laws, that the Plaintiff here complains of.

III

Plaintiff would respectfully say and show this Honorable Court, that the Military Tribunal which tried him, was in effect a Court Martial, purporting to deprive him by a hearing of a valuable status and right for conduct which was not criminal, and for actions which had no connection with the Army in any way, and which were in themselves legal. The aforesaid Military Tribunal, or Board of Officers which purported to try the defendant, had no jurisdiction over the subject matter on which it purported to rule, and consequently its judgment is void. The Plaintiff herein has never been guilty of a felony, misdemeanor, or military crime in his life, except for traffic tickets, and at the time he was deprived of his commission he had an outstanding good record and character as a military officer, so that the purported judgment or findings of the Board of Officers aforesaid was not based on any illegal conduct or allegation of any dereliction in his duties or conduct as a reserve officer in connection with the discharge of his duties as such an officer or with his relations with the military, but was in fact based on a court judgment of which he had no notice, which was rendered without his presence, and which was subsequently held void in its entirety. Further, the plaintiff would show that for a military tribunal to obtain jurisdiction to try a serviceman, the offense charged must be service connected, and that not only was the offense charged against the plaintiff not service-con-

ected, but it was not an offense in law, either civil or nilitary, and furthermore did not fall under the definition f misconduct as that term is used in the Army Regula- ions current at that time AR-140-5, Sec. 74c. Plaintiff ays that the action of the aforesaid Board of Officers as capricious and arbitrary, was politically inspired and notivated, as was the action of the Commanding General nd the Secretary of War of that day, and that the action f the United States Army, through its officials and offi- ers, deprived the Plaintiff of his rights under the Con- titution of the United States, more particularly of his ight to due process of law, of equal protection of the aws, and of a trial by jury. Plaintiff would further say hat the charge against him at that time was not defined, nd the regulation used against him, to wit AR-140-5, ec. 74c, was so ill-defined, vague, and all-inclusive as o be unconstitutional on its face.

Plaintiff particularly complains of the fact that the ord "misconduct", as used in AR-140-5, Sec. 74c is ot defined at all, and could include any conduct which laintiff's Army superiors chose to label "misconduct", nd that said word was in fact capriciously and arbitrarily isapplied to the plaintiff's conduct in running for office, nd changing his name to do so—acts legal in themselves, nd having nothing to do with his capabilities or efficiency r character as an officer in the reserve of the U. S. Army. n depriving the plaintiff of his commission, the Army cted counter to the spirit, intent, and letter of its own egulations, particularly AR-140-5, Sec.74c.

Plaintiff further says that he has exhausted all the real emedies available to him. He applied to the Secretary f War's Discharge Review Board for restoration to his ormer status and immediate assignment to a combat

zone, in the year 1944. His application was denied by letter of May 16, 1945 A.D. Any subsequent purported statements that the plaintiff's case could be reheard and re-presented to the Board were and are idle and illusory allegations of remedy, since the case had been heard and determined upon all the availiable evidence, and since plaintiff had no additional evidence to present, any further attempt to remedy his wrongs before the said Discharge Review Board would have amounted to, and does amount to, a futility.

Plaintiff would further show that the law is here to be applied retroactively in accordance with the holdings in *Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683 (1969) and *United States of America ex rel. Flemings v. Chafee,* 330 F. Supp. 193 (1971).

In sum, Plaintiff says that he has been deprived of due process of law, equal protection of the laws, and trial by jury under the Constitution of the United States and Amendments thereto, and that the Defendant's servants and officers acted in violation of Army regulations as set out hereinabove and that such act was an act of the United States Army, and was unconstitutional and void.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff herein prays this honorable Court to cite the Defendant herein to appear and answer, and that upon a final hearing hereof, that the action of the Board of Officers hereinbefore referred to be set aside, and the action of the Army in terminating the Commission of the Plaintiff be set aside, and the appropriate records corrected to show an honorable discharge, and in the alternative Plaintiff prays for an honorable discharge to be issued at this time, from the U. S. Army, and further prays the Court to grant

m general relief, that is to say, such other and further lief as the Court may deem appropriate in the premises.

Respectfully submitted,

WALTER B. CONWAY
Walter B. Conway
Attorney at Law
3818 Dunlavy No. 7
Houston, Texas 77006
Attorney for Plaintiff
Telephone: (713) 523-6374

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. 73-2529

CIVIL ACTION NO. CA-3-6226-B

JEFFERSON T. BAKER, Plaintiff,

v.

HON. ROBERT F. FROEHLKE, Secretary of the Army of the United States, Defendant.

MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

To The Honorable Judge of Said Court:

COMES NOW the Honorable Robert F. Froehlke, Secretary of the Army of the United States, Defendant, by and through the United States Attorney for the Northern District of Texas and files this its Motion to Dismiss and/or for Summary Judgment pursuant to the provisions of Rule 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, for the reason that Plaintiff's Original Petition fails to establish a basis for jurisdiction over the subject matter of his Petition and fails to state a claim upon which relief may be granted and this Defendant, the Honorable Robert F. Froehlke, Secretary of the Army of the United States, is entitled to Judgment as a matter of

law, there being no material issue of fact in that the Plaintiff, Jefferson T. Baker, has not exhausted all administrative remedies available to him nor has the Plaintiff shown that there has been a deprivation of a Constitutional right or course of conduct in violation of statutory or regulatory procedures.

This Motion is based upon the pleadings filed herein and the Affidavit attached to this Motion.

WHEREFORE, premises considered, Robert F. Froehlke, respectfully prays that Plaintiff's Original Petition be dismissed as to him and that he go hence with his costs, and for such other and further relief to which he may show himself justly entitled.

FRANK D. McCOWN
United States Attorney
ROGER J. ALLEN, Assistant
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss and/or for Summary Judgment was served upon the plaintiff's attorney, Mr. Walter B. Conway, 3818 Dunlavy, No. 7, Houston, Texas 77006, by depositing same in the United States Mail.

DATED this 22nd day of December, 1972.

ROGER J. ALLEN
Roger J. Allen, Assistant
United States Attorney
1100 Commerce, Room 16G28
Dallas, Texas 75202

IN THE

United States District Court

For The Northern District of Texas
Dallas Division

(Filed April 16, 1973)

JEFFERSON T. BAKER, Plaintiff

v.

HON. ROBERT F. FROEHLKE,
Secretary of the Army of the United States,
Defendant

Civil No. 3-6226-B

ORDER OF DISMISSAL

On this date came on to be considered in the above entitled and numbered cause, the pleadings and briefs filed herein by the parties, and the Court without the need of oral argument or testimony has determined and finds that the Motion to Dismiss filed herein by the Defendant, THE HONORABLE ROBERT F. FROEHLKE, Secretary of the Army of the United States, should be granted,

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Motion to Dismiss filed herein by the Defendant, THE HONORABLE ROBERT F. FROEHLKE, be, and hereby is granted, for the reason that the Plaintiff has failed to exhaust his administrative remedies, and therefore the above entitled and numbered cause be, and the same is, hereby dismissed.

DATED this 16th day of April, 1973.

SARAH A. HUGHES
United States District Judge

CONCLUSIONS AND RECOMMENDATIONS:

After a careful examination and consideration of the oral testimony and documentary evidence offered before this Board of Inquiry in this matter, including the testimony of First Lieutenant George B. Terrell, Inf.-Res., himself, the Board having closed, it is the decision of this Board of Inquiry that Accused did perpetrate a fraud and deception upon the people of the State of Texas and upon the 68th Judicial District Court, of Dallas County, Texas.

It is the opinion of the Board that it is to the best interests of the government and the Officers' Reserve Corps that the Reserve Commission of this officer, namely, First Lieutenant George B. Terrell, Inf.-Res., as known on present War Department records, and First Lieutenant Jefferson Taswell Baker, as now legally known by court orders, be terminated, and the Board so recommends.

AG 201 (Baker, Jefferson Taswell) Res.
(8-21-34)

November 5, 1934.
EXH-463.

Discharge from the Officers'
Reserve Corps.

Thru: The Commanding General, Eighth
Corps Area

Jefferson Taswell Baker,
P.O. Box 831,
Dallas, Texas.

1. By direction of the President and under authority of the National Defense Act as amended, you are, this date, discharged from your commission as First Lieutenant, Infantry Reserve of the Army of the United States, as provided by Paragraph c, AR 140-5, upon the approved recommendation of a Board of Officers.

2. It is requested that receipt of this notice be acknowledged by filling in the inclosed A.C.O. Form 701 and returning it to this office, supplying signature, date and place in the spaces provided therefor.

By order of the Secretary of War:

CLARK LYNN
Adjutant-General.

1 Incl.
A.C.O. Form 701
Copy to:
The Chief of Infantry.

Please note name is now Jefferson Taswell Baker and make cross reference to George Baker Terrell.

MEMO For: The Chief of the Personnel Bureau.

SUBJECT: Character of the Discharge of former First Lieutenant Jefferson T. Baker, Inf-Res.

1. Mr. Jefferson T. Baker was discharged as a First Lieutenant, Inf-Res., November 5, 1934, upon the recommendations of a board of officers appointed under the provisions of Paragraph 74-c, A. h. 140-5.

2. The basis of the proceedings was alleged misconduct in having his name changed legally to further his political ambitions. The details thereof can be best understood from a review of the case prepared by The Judge Advocate General, March 12, 1940.

3. Mr. Baker has now requested that he be informed of the character of his discharge and whether or not such separation would bar him from enlistment.

4. I recommend:

a. That the discharge of former First Lieutenant Jefferson T. Baker be determined as having been under circumstances other than honorable; and

b. That his inquiry be referred to the Enlisted Division for appropriate reply.

E. C. DESOBRY
Colonel, Adjutant General's
Department.

LEC:MSB

AG 201 Baker, Jefferson T.
(3-16-41) E.

April 7, 1941.

Mr. Jefferson T. Baker,
Sheldon, Texas.

Dear Sir:

Reference is made to your letter of March 16, 1941, regarding your desire to enlist in the Army, National Guard, or in any of the various military services.

The records show that you were discharged under circumstances other than honorable November 5, 1934 as a First Lieutenant, Infantry Reserve.

The enlistment of any man who has passed his thirty-fifth birthday and has had no prior enlisted service in the Regular Army or the National Guard while in the Federal service is barred by law. Since the records show that you are now forty-one years of age, you are ineligible for enlistment in the Regular Army.

For information regarding enlistment in the National Guard, Navy, and Marine Corps, application should be addressed to the State Adjutant General, Austin, Texas; the Chief, Bureau of Navigation, Navy Department, and Major General Commandant, United States Marine Corps, Washington, D. C., respectively.

Very truly yours,

M. S. ADAMS,
Major General,

The Adjutant General.
By: George Amatury

Born March 25, 1900.

APPLICATION FOR REVIEW OF DISCHARGE OR DISMISSAL FROM THE ARMY OF THE UNITED STATES

SET NUMBER	THIS APPLICATION WILL BE FORWARDED TO THE ADJUTANT GENERAL'S OFFICE, WASHINGTON 25, D.C., FOR REFERENCE TO THE SECRETARY OF WAR'S DISCHARGE REVIEW BOARD, ESTABLISHED UNDER SEC. 301, PUBLIC LAW 848, 79TH CONGRESS, APPROVED 20 JUNE, 1946. DO NOT WRITE ABOVE THIS LINE	DATE RECEIVED BY BOARD

LAST NAME - FIRST NAME - MIDDLE INITIAL		ARMY SERIAL NUMBER
Baker, Jefferson T.		O-293665

I HEREBY MAKE APPLICATION TO THE SECRETARY OF WAR'S DISCHARGE REVIEW BOARD FOR RECONSIDERATION AND CHANGE OF THE CHARACTER OF DISCHARGE CERTIFICATE OR DISMISSAL GIVEN ME AT THE TIME OF SEPARATION FROM THE ARMY OF THE UNITED STATES. IN SUPPORT OF THIS REQUEST I SUBMIT THE FOLLOWING DATA:

GRADE AT DISCHARGE OR RELIEF FROM ACTIVE DUTY	4. ORGANIZATION OR ASSIGNMENT AT DISCHARGE OR RELIEF FROM ACTIVE DUTY		
1st Lt., Inf. Reg.	359th. Inf. Regiment, Dallas, Texas.		
5. DATE OF RELIEF FROM ACTIVE DUTY	6. PLACE OF DISCHARGE OR RELIEF FROM ACTIVE DUTY	7. DATE OF DISCHARGE	8. TYPE AND NATURE OF DISCHARGE OR DISMISSAL
Nov. 5, 1934	359th. Inf. Regt., Dallas, Texas	Nov. 5, 1934	Under Par. 76a, AR 140-5 "Without honor"

9. OTHER EVIDENCE SUBMITTED IN SUPPORT OF APPLICATION IS LISTED BELOW AND FORWARDED. (This evidence may include the testimony of witnesses executed before any officer authorized by Federal or State Law to administer oaths, and brief containing arguments in support of my contentions. If space is insufficient use back of this sheet.)

Certified Copies of Court Orders, State District Courts, Dallas, County, Texas.
Affidavits of disinterested citizens of the State of Texas.
Certificate of Capacity for Captaincy, Inf. Res., U.S.Army.
[redacted]
[redacted]
[redacted] 1--19 page letter from J.T.Baker to The President of the U.S.
[redacted]
Certificates of Completion of Subcourses, Army Correspondence Courses.
Certificate for eligibility for promotion to grade of Captain.
Letter from Charley Lockhart, State Treasurer, State of Texas, to J.T.Baker
[redacted] (OVER)

10. SPECIFIC ACTION REQUESTED

Restoration Status Quo of my former United States Army Reserve Status.
Recommendation by the Board of Review to the War Department for my immediate assignment to a combat zone.

11. I DESIRE TO APPEAR BEFORE THE REVIEW BOARD IN PERSON (In response to qu's.)	YES	NO
	X	

12. I DESIRE TO BE REPRESENTED BY COUNSEL (In response to qu's.)	YES	NO
	X	

13. NAME AND ADDRESS OF COUNSEL (If any) DESIGNATED TO REPRESENT ME BEFORE REVIEW BOARD

Jefferson T. Baker, Attorney at Law, 918 Noyes St., Evanston, Ill. (Will represent self)
No Co-Counsel in this case has not been selected as yet.

14. IT IS UNDERSTOOD THAT IF NO COUNSEL IS DESIGNATED BY ME THE BOARD WILL HAVE AT ITS SESSION AN OFFICER WHOSE DUTY WILL BE TO EXAMINE WAR DEPARTMENT RECORDS, TOGETHER WITH SUCH OTHER EVIDENCE AS I MAY SUBMIT, AND PRESENT TO THE BOARD THE PERTINENT FACTS IN MY BEHALF.

15. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTY PROVIDED FOR MAKING A FALSE STATEMENT.

IF THIS APPLICATION IS SIGNED BY A PERSON OTHER THAN THE ONE WHOSE DISCHARGE APPEARS IN ITEM 1 ABOVE INDICATE STATUS IN APPROPRIATE BOX.

NEXT OF KIN	LEGAL GUARDIAN	ATTORNEY

Jefferson T. Baker, Attorney at Law
SIGNATURE
918 Noyes St., Evanston, Ill.
ADDRESS

IF MARK MADE BY MARK MUST BE WITNESSED BY TWO PERSONS TO WHOM THE INDIVIDUAL MAKING THE APPLICATION IS PERSONALLY WELL KNOWN. THE SIGNATURES AND ADDRESSES OF SUCH WITNESSES MUST BE SHOWN BELOW.

NAME AND ADDRESS OF WITNESS TO SIGNATURE BY MARK	SIGNATURE AND ADDRESS OF WITNESS TO SIGNATURE BY MARK

A.G.O. FORM NO. 96 12 September 1944 [illegible] Local Reproduction Authorized

PROCEEDINGS OF THE SECRETARY OF WAR'S DISCHARGE REVIEW BOARD

The Board met at Washington, D.C. at 0900 hours on 20 January 1945, pursuant to the call of the President.

Present:

Colonel Harry C. Ruhl, O-214353, Acting President
Colonel Chauncey M. Hooper, O-241942, Member
Colonel George W. Price, O-3604, Member
Colonel Robert E. Woodward, O-175949, Member
Colonel Thomas H. Stillwell, O-186979, Member
Lieutenant Colonel Louis P. D. Warren, O-204885, Secretary-Recorder.

(PRINTER'S NOTE: Next 2 lines illegible)

The Secretary then read the order appointing the board, copy of which is attached hereto as Exhibit A. The following documentary evidence was introduced by the Examiner.

Exhibit B—Application for Review, AGO Form 94
Exhibit C—201 File, AG201, Former 1st Lieutenant Baker, Jefferson T., ASN O-253665
Exhibit D—Brief of Examiner, Major Albert M. Morgan

The applicant appeared before the Board and testified under oath; record of testimony attached. (see Exhibit E).

FINDINGS

After careful consideration of the evidence of record in the case, the Board finds:

a. That the action of the Board of Officers convened ıder the provisions of paragraph 74(c), AR 140-5 was accordance with such regulations.

b. That the action of the Board of Officers and of the viewing authority was amply supported by the evidence.

c. That no additional evidence of sufficient weight and edibility to warrant reversal of the action of the war epartment in this case has been adduced before the ecretary of War's Discharge Review Board.

CONCLUSIONS

The Board concludes that the application for an honor-ble discharge and certificate of service, W-AGO Form 80, be denied.

HARRY C. RUHL
Harry C. Ruhl
Colonel, Infantry
Acting President

OUIS P. D. WARREN
ouis P. D. Warren
ieutenant Colonel
ecretary-Recorder

J. T. Baker
713 Armor Street
Pasadena, Texas

October 26, 1960

The Secretary of War's *Discharge Review Board,*
3535 Munitions Building,
Washington 25, D.C.

Dear Sirs:

I request that my Army Discharge of 1934 be reviewed and corrective action taken on the basis of new evidence that I have, i.e., lack of Army's Jurisdiction over a Reserve Officer's Legal, Civil, activities, in and out of State Courts, and many another one.

Yours truly,

J. T. BAKER
J. T. Baker

JTB/cb

Inclosures: 1—War Department Letter, dated May 16, 1945.

GCC-SR-B Baker, Jefferson T. 10 November 1960
SN (26 Oct. 60)

Mr. J. T. Baker
713 Armor Street
Pasadena, Texas

Dear Mr. Baker:

Your letter, requesting a reconsideration of the review of your discharge was referred to this office.

As provided by regulations, the Board will not open a case for reconsideration unless the basis of the request indicates additional material evidence which is likely to result in a decision contrary to the Board's original decision and which was not available to the Board at that time.

Since you have submitted no new material evidence pertinent to the case which would warrant a reversal of the Board's decision, your case may not be reconsidered.

Sincerely yours,

EUGENE S. TARR
Colonel, AGC
Commanding

Inclosure
Ltr 16 May 45

AGAC-SS-A Baker, Jefferson T.
NSN (13 Aug 64)
31 Aug 1964

Mr. J. T. Baker
713 Armor Street
Pasadena, Texas

Dear Mr. Baker:

Your letter to the President concerning a review of your military record has been referred to the Department of Defense for direct reply at the President's direction.

The Army Discharge Review Board reviewed the type and nature of your discharge on 4 May 1945, and concluded you had been properly discharged in accordance with the regulation in effect at the time of your separation.

I am inclosing an application for your use if you wish to apply for a rehearing of your case by the Board. If you have any new material evidence which was not previously available, it should be attached to the application. No new evidence, however, is required for the rehearing. The completed application should be forwarded to the Commanding Officer, U. S. Army Records Center, St. Louis, Missouri 63132. When the application is received,

will be processed and forwarded with your records, to Army Discharge Review Board for consideration.

Sincerly yours,

J. L. RICHARDSON
J. L. Richardson
Lieutenant General, GS
Deputy Chief of Staff
for Personnel

losures:

USARCEN MP 678
DD Fm 293

EMO FOR RECORD:
(See atchd sheet)

AGAC-SS-A Baker, Jefferson T.
NSN (13 Aug 64)

Mr. J. T. Baker

MEMO FOR RECORD:

Former Reserve officer discharged from his commission as 1st Lt 5 Nov 34 under conditions OTH pursuant to approved recommendations of a Board of Officers (misconduct in civil life, legally changing name to George Baker Terrell, name similar to Congressman, and ran for election for state office using that name. MC charged name was changed for fraudulent use in politics and won case; officers name restored to original name of Jefferson T. Baker) Secretary of War's Discharge Review Board denied application in 1945. Furnished DD Form 329 for rehearing of his case.

W. Smith

COUNTY OF ARLINGTON)
) ss:
STATE OF VIRGINIA)

AFFIDAVIT

I, RAYMOND J. WILLIAMS, being first duly sworn, state and depose as follows:

I am the Executive Secretary of the Army Board for Correction of Military Records and as such exercise general adminstrative supervision over the operation of that board. After a thorough search of the records maintained by the board I have been unable to locate any record of an Application for Correction of Military or Naval Record under the provisions of Title 10 United States Code section 1552 from a Jefferson Taswell Baker.

RAYMOND J. WILLIAMS
Raymond J. Williams

Sworn to and subscribed before me this 7th day of December, 1972 at Arlington, Virginia.

PAUL EVANS
Notary Public

My commission expires:
8/25/75

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1973

NO. 73-2529
Summary Calendar

D. C. Docket No. CA-3-6226

JEFFERSON T. BAKER, Plaintiff-Appellant,

v.

HON. ROBERT F. FROEHLKE,
Secretary of the Army of the United States,
Defendant-Appellee.

Appeal from the United States Court
for the Northern District of Texas

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

October 24, 1973

Issued as Mandate: January 3, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1405

JEFFERSON T. BAKER, PETITIONER

v.

HOWARD H. CALLAWAY, SECRETARY OF THE ARMY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In 1934, petitioner was discharged from his commission as first lieutenant in the Infantry Reserve of the Army of the United States "under circumstances other than honorable" (Pet. App. 40), after a Board of Officers concluded that he "did perpetrate a fraud and deception upon the people of the State of Texas" (Pet. App. 37) by legally changing his name to further his political ambitions (Pet. App. 39, 48). Petitioner commenced this action in August 1972, seeking to set aside his discharge and have his military records corrected, or, alternatively, to compel the Army to grant him an honorable discharge (Pet. 6). At no time since his discharge in 1934 has petitioner applied to the Army Board for Correction of Military Records for relief (Pet. 6, 7; Pet. App. 49), pursuant to 10 U.S.C. 1552.[1]

---

[1]Petitioner did seek relief at lower administrative levels. He applied in 1944 to the Discharge Review Board of the Secretary of War for correction of his discharge (Pet. 5; Pet. App. 41)

The district court granted the government's motion to dismiss the complaint "for the reason that the Plaintiff has failed to exhaust his administrative remedies" (Pet. App. 36). The court of appeals, concluding that "[t]he trial court correctly held that the plaintiff was not entitled to relief because he had failed to exhaust the administrative remedies available to him under 10 U.S.C. §§ 1552-53 (1970)," affirmed (Pet. App. 15), and denied rehearing (Pet. App. 16).

Since the decision of the court of appeals is correct, and there is no conflict of decisions, further review by this Court is not warranted.

1. As this Court has written, "[t]he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi* v. *Davidson,* 405 U.S. 34, 37. This doctrine, which must be applied in each case with an "understanding of its purposes and of the particular administrative scheme involved" (*McKart* v. *United States,* 395 U.S. 185, 193), has been applied by the courts to require that persons seeking to correct their military records or to challenge their discharge from military service must first exhaust the administrative remedies available to them, such as review under 10 U.S.C. 1552 through the appropriate

---

and was denied relief by that Board in 1945 (Pet. App. 42-43). He requested reconsideration by the Discharge Review Board in 1960 (Pet. App. 44-45), but chose not to seek rehearing of his case (Pet. 5), although he was advised in writing that he did not have to present any new evidence in order to apply for such a rehearing (Pet. 46-47).

The Army Board for Correction of Military Records will not consider a discharge until after the individual has applied to the Discharge Review Board. See 32 C.F.R. 581.3(c)(3).

Board for Correction of Military Records. See, *e.g.*, *Sohm* v. *Fowler*, 365 F. 2d 915 (C.A.D.C.); *McCurdy* v. *Zuckert*, 359 F. 2d 491 (C.A. 5); *Schwartz* v. *Covington*, 341 F. 2d 537 (C.A. 9); *Reed* v. *Franke*, 297 F. 2d 17, 27 (C.A. 4). See also *United States* v. *Augenblick*, 393 U.S. 348, 349. Since petitioner admits that he has never sought relief from the Army Board for Correction of Military Records (Pet. 6, 7), and the Board is capable of granting him full relief, he has failed to exhaust his administrative remedies.

2. Petitioner attempts to find support for his position in the fact that an individual seeking a conscientious objector discharge is not required to present his claim to the Correction Board prior to judicial review. See *Parisi* v. *Davidson, supra,* 405 U.S. at 38, n. 3. That rule, however, was based upon a unique procedure established by the Department of the Army, detailed in Army Regulation 635-20, to be followed by a serviceman who seeks classification as a conscientious objector on the basis of beliefs that developed after entry into the service. That procedure was the exclusive administrative remedy for servicemen seeking such relief, and with respect to this particular type of relief, compliance with Army Regulation 635-20, rather than an appeal to the Army Board for Correction of Military Records, was held to mark the point at which administrative remedies have been exhausted. Department of Justice Memo. No. 652 (October 23, 1969); see *Parisi* v. *Davidson, supra.* Since an individual who has followed the procedures of Army Regulation 635-20 has exhausted his administrative remedy in conscientious objector cases, resort to the appropriate Board for Correction of Military Records is not a precondition to judicial review *in such cases.*

Petitioner, however, makes no claim of conscientious objection. Rather, he claims that he is entitled to correction of his military records because the regulation pursuant to which he was discharged is allegedly unconstitutional (Pet. 11-13).[2] Accordingly, petitioner's reliance on *Parisi* is misplaced. He has an adequate administrative remedy which he has failed to exhaust, and the courts below therefore correctly determined that he is barred from judicial review.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[2]Neither court below addressed the merits of the constitutional claims made in the petition concerning the validity of petitioner's discharge (Pet. 11-14). Because the merits are not properly before the Court at this time, there is no need to hold the petition pending the decision in *Secretary of the Navy* v. *Avrech,* No. 72-1713, probable jurisdiction noted October 9, 1973, argued February 20, 1974.

[3]It would appear that, in any event, the relief petitioner seeks would be barred on the ground of laches, in view of his repeated failures to pursue his claim.